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March 28, 2000

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., N.W.
Washington, CD 20580

Re: Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313
Comment

As a member of small law firm with a varied commercial practice, I find it necessary to urge the Commission to revise the Proposed Rule referenced above. Despite the fact that we are in the legal business and are retained by our clients to use the legal institutions to address their grievances, the courts and the FTC have seen fit to denominate us as "debt collectors". The primary result of this denomination has been the creation of a new cottage industry of attorneys who take advantage of technical violations of the FDCPA to use the federal courts to sue attorneys. I can not believe that this was the intent of this legislation which was nobly enacted to prevent abuses in the collection industry.

The proposed G-L-B Act also has a noble purpose in protecting the privacy of consumers especially in an age where large financial institutions merge with one another giving them the ability to act detrimentally to its unsuspecting customer. But like the FDCPA, the provision of the act as proposed will merely foster new litigation, and leave legitimate creditors without fair remedy. Specifically I propose that the Act expressly exclude attorneys and debt collection agents from the definition of "financial institution." Clearly my firm and others like us will never be confused with Citibank or Chase. A correlative revision is also required to ensure that the interaction between the lawyer or the collection agent and the debtor is not subject to an interpretation that a "customer relationship" exists. Such a revision is consistent with the intent of both the Gramm-Leach-Bliley Act (the "Act") and the Proposed Rule. In addition, it will avoid the flood of litigation that is otherwise certain to occur.

My concern is that the Proposed Rule allows an interpretation of the Act that defines third party debt collectors (including law firms and single practitioners who may on

occasion simply be asked to collect an outstanding balance due the local "mom & pop" deli) as "financial institutions"!! Besides the obvious, such a definition would trigger a full panoply of notice requirements which would present little problem to the true financial instituion which sends volumes of notices to its customers daily, but to the small firm would be a serious enough burden so as to put some out of business. Similarly it would not be long before a new legend of attorneys are filing their complaints in federal court because of some technical violation of these notice requirements. The proposed definition of a "financial institution" as it stands seems to include debt collection agents and attorneys. Contrary to the Commission's express belief, the broad definition of "customer relationship" lends itself to being so applied. Of course, it is only through another onslaught of litigation that these and other questions will be raised and answered.

The Commission's clear guidance now would avoid extensive litigation and the potential expansion of liability for attorneys similar to that which occurred under the Fair Debt Collection Practices Act ("FDCPA"). A clear exception for attorneys and debt collection agents is imperative under the Proposed Rule because, unlike the FDCPA, the Act is not intended to apply to the interactions between attorneys and defendant debtors.

The driving force behind the Act is consumer choice. The notice requirements with respect to privacy policies are intended to allow potential customers the opportunity to review, in advance, the policies of a financial institution and to make an informed choice as to which financial institution they will patronize.

The relationship in the context of the collection attorney, which may be characterized only as adversarial, simply does not arise in this manner. The only role the debtor plays in the process is in creating the delinquency; the freedom to select from among various collectors or attorneys is not a choice that is available to the debtor. Informed, voluntary decisions are wholly removed from the process once the financial institution enlists the services of an attorney to enforce payment obligations on a past due account. Inherent in this process is finality, not continuity, which aptly demonstrates that an express exception for collection agents is essential.

Attorneys as debt collectors certainly must be excepted from the Proposed Rule's expansive definition of a financial institution. Law firms are not financial institutions and no stretch of the imagination can interpret them as being so. Moreover, a customer relationship simply cannot exist between the attorney and the account debtor because such an interpretation would be at odds with state ethical rules governing attorneys, whose duty it is to zealously represent the entity to whom a debt may be owed. Imposing on an attorney a concurrent duty to the adversary of the client creates, by statute, an impermissible conflict of interest, particularly since the attorney's ethical obligations may require otherwise impermissible disclosure in order to advocate the client's interest.

In conclusion, the Commission should give further consideration to the Proposed Rule and its effect on attorney and collection agents. At a minimum, the Commission

should consider the intended and practical consequences on debt collection agents generally and attorneys in particular.

Thank you for the opportunity to comment on this very important Proposed Rule.

Sincerely,

Garry M Bolnick